

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID VINCENT LESHOCK,

Defendant-Appellant.

UNPUBLISHED

November 12, 2020

No. 352480

Oakland Circuit Court

LC No. 2019-178412-AR

Before: STEPHENS, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ the circuit court’s denial of his application for leave to appeal the district court’s order denying his motion to suppress. We affirm.

I. BACKGROUND

On June 5, 2019, Michigan State Police Trooper Sergio Corona performed a traffic stop on defendant’s vehicle. As a result of that traffic stop, defendant was charged with a civil infraction and operating while intoxicated (OWI), MCL 257.625. Trooper Corona administered three field sobriety tests: (1) horizontal gaze nystagmus (HGN), (2) walk-and-turn (WAT), and (3) one-leg stand (OLS). He also administered a preliminary breath test (PBT).

Defendant filed a motion to suppress evidence and dismiss the charge of OWI, arguing that the traffic stop was unlawful and that Trooper Corona lacked probable cause to arrest defendant. At a suppression hearing, Trooper Corona, defendant, and defendant’s expert, Dr. Ronald Henson, testified. After the hearing, the district court agreed with defendant that the results of the HGN and PBT were unreliable and would not be used in making its determination. However, the court

¹ *People v Leshock*, unpublished order of the Court of Appeals, entered April 1, 2020 (Docket No. 352480).

ultimately denied defendant's motion because there was other reliable evidence to support both the stop and defendant's arrest.

Defendant filed an application for leave to appeal or for peremptory reversal with the circuit court, which denied both. Defendant next filed an application for leave to appeal in this Court, and this Court denied the application. *People v Leshock*, unpublished order of the Court of Appeals, entered March 5, 2020 (Docket No. 352480). After defendant filed a motion for reconsideration, this Court granted leave to appeal. *People v Leshock*, unpublished order of the Court of Appeals, entered April 1, 2020 (Docket No. 352480).

II. ANALYSIS

A. STANDARD OF REVIEW

When reviewing a decision on a motion to suppress, we review a trial court's factual findings for clear error. *People v Mazzie*, 326 Mich App 279, 288; 926 NW2d 359 (2018) (quotation marks and citations omitted). "[T]hose findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made." *Id.* at 288-289 (quotation marks and citations omitted). "We review de novo a trial court's ultimate decision on a motion to suppress." *Id.* at 289 (citation omitted). "When the record contains a video recording of the events in question, however, this Court need not rely on the trial court's conclusions as to what the video contains." *People v Campbell*, 329 Mich App 185, 193; 942 NW2d 51 (2019) (citation omitted).

B. ARREST

Defendant first argues on appeal that Trooper Corona lacked probable cause to arrest him for OWI because he failed to administer the field tests in compliance with National Highway Transportation Safety Administration (NHTSA) standards, thus making them unreliable. We disagree.

To lawfully arrest a person without a warrant, a police officer must possess information establishing probable cause to believe that an offense has occurred and that the defendant committed it. *People v Cohen*, 294 Mich App 70, 74-75; 816 NW2d 474 (2011). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019), quoting *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). The probable cause standard is a nontechnical conception judged from the totality of the circumstances before the arresting officers. *Cohen*, 294 Mich App at 75. Probable cause does not require certainty; instead, it requires only a probability or substantial chance of criminal activity. *Champion*, 452 Mich at 111 n 11.

Even after suppressing the results of the HGN test and PBT, the district court correctly concluded that Trooper Corona had probable cause to arrest defendant. Probable cause could reasonably have been found based upon (1) Trooper Corona's observations, (2) defendant's admission that he had been drinking, and (3) defendant's performance on the WAT and OLS tests.

First, Trooper Corona observed defendant cross the fog line two times and the lane dividing line one time. Trooper Corona then pulled up beside defendant and saw that defendant was not distracted. Defendant was not on his cellphone or adjusting the radio. After discovering no apparent cause for defendant's failure to maintain his lane, Trooper Corona began to suspect that defendant may be operating his vehicle while intoxicated. Once Trooper Corona initiated the traffic stop, he observed that defendant had red, watery eyes and his breath smelled of alcohol. See *People v Rizzo*, 243 Mich App 151, 161; 622 NW2d 319 (2000) (holding that an odor of intoxicants on a motorist's breath "may give rise to a reasonable suspicion that the motorist has recently consumed intoxicating liquor, which may have affected the motorist's ability to operate a motor vehicle"). Even though defendant attributes the appearance of his eyes to angioedema, Trooper Corona was not required to rule out innocent explanations for defendant's appearance in order to have probable cause to arrest. See, *People v Garvin*, 235 Mich App 90, 104; 597 NW2d 194 (1999).

Second, defendant admitted to Trooper Corona that he was heading home from River Rock Bar. Defendant told Trooper Corona that he had consumed two martinis at the bar.

Third, defendant did not pass the WAT and OLS tests. During the WAT test, defendant failed to touch heel to toe on each step, and also stepped off the line where the test was being administered on multiple occasions. During the OLS test, defendant had to place his foot down three times during the test. Defendant's poor performance on the OLS test was captured on video.

Defendant argues that the WAT and OLS tests were improperly conducted, and therefore negate a probable cause determination. In support of this argument, defendant relies on *People v Berger*, 217 Mich App 213; 551 NW2d 421 (1996). In *Berger*, this Court "conclude[d] the only foundation necessary for the introduction of evidence regarding the HGN test in Michigan is evidence that the test was properly performed and that the officer administering the test was qualified to perform it." *Id.* at 218. Defendant relies on the testimony of his expert, Dr. Henson, to argue that the WAT and OLS tests were improperly performed and that the results of those tests, pursuant to *Berger*, should have been excluded. However, the two key issues defendant raises in regards to the administration of the tests—the patrol car's strobe light and the presence of traffic—are unfortunate realities of roadside sobriety testing. Furthermore, as seen on the video recording, only two cars passed going in the opposite direction while defendant performed the test. Trooper Corona testified that he received training at the police academy regarding how to conduct field tests, and defendant does not dispute that Trooper Corona was qualified to perform the tests.

Defendant further argues that his performance on the WAT and OLS tests was negatively impacted by medical issues. The trial court, however, held that defendant's medical issues went toward the weight of the evidence rather than its admissibility. This was the correct ruling because, as stated previously, an officer is not required to rule out innocent explanations in order to have probable cause to arrest. *Garvin*, 235 Mich App at 104.

Based on the totality of the circumstances, Trooper Corona had probable cause to arrest defendant.

C. TRAFFIC STOP

Defendant argues that the district court erred when it held that Trooper Corona's traffic stop was justified. We disagree.

"Both the United States and Michigan Constitutions protect against unreasonable searches and seizures." *People v Simmons*, 316 Mich App 322, 325-326; 894 NW2d 86 (2016). "Under the Fourth Amendment, stopping a vehicle and detaining the occupants amounts to a seizure." *Id.* "A traffic stop is justified if the officer has an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *Id.* (quotation marks and citation omitted). "This includes a violation of a traffic law." *Id.* "The determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced." *Id.* (quotation marks and citation omitted).

Trooper Corona performed the traffic stop for two reasons: (1) defendant's commission of a civil infraction for failure to maintain his lane and (2) his suspicion that defendant was operating his vehicle while intoxicated. Under MCL 257.642(1)(a), "[a] vehicle shall be driven as nearly as practicable entirely within a single lane" Trooper Corona testified that defendant crossed the fog line twice and the lane dividing line once. As such, he had an articulable and reasonable suspicion to believe that defendant had violated MCL 257.642. This alone justified the stop, but Trooper Corona had further suspicions based on his observations of defendant. Due to defendant's failure to maintain his lane, along with the absence of any notable distractions, Trooper Corona believed that defendant could be intoxicated.

Defendant alleges that the stop occurred too long after the alleged lane violations, but defendant admitted in his testimony that Trooper Corona only followed him for approximately five minutes. This was a short duration of time considering that Trooper Corona first observed defendant's lane violations, then moved closer to investigate, and finally waited for a safe stretch of road in order to conduct the traffic stop. Under these circumstances, Trooper Corona had a valid excuse for the short delay in stopping defendant.

Defendant tries to dismiss Trooper Corona's suspicion that defendant could be intoxicated as a mere "hunch" based on the following exchange:

Q. So, now you pull back?

A. Yes, sir.

Q. To continue to make observations?

A. Yes, sir.

Q. Because you haven't yet decided in your own min[d] that you'd seen enough to effectuate a traffic stop?

A. No, I—I take that back, sir. So, again, I observed the improper lane use, as I explain in my report, I pulled up next to the driver to observe what he was doing. I saw that he was just kind of relaxed, not playing on his phone. He wasn't using the radio. So, at that point when I started falling back to get behind him

because, as you can see there's a curve there, I was thinking there's a chance I was suspecting that perhaps he may have been drinking. So, I'm—

Q. So, you had a hunch?

A. So, I—yes, I had a hunch.

“Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause.” *Champion*, 452 Mich at 98 (quotation marks and citation omitted). Trooper Corona observed defendant's failure to maintain lanes and, after an investigation, discovered that this failure was not attributable to defendant's cellphone or radio usage. While Trooper Corona repeated the word “hunch,” a complete review of the testimony supports a finding that he operated on much more than a hunch.

Defendant also argues that Trooper Corona's testimony is not credible. However, the trial court specifically found that Trooper Corona was testifying truthfully. When reviewing a motion to suppress, we cannot disregard a trial court's findings of fact unless we have a definite and firm conviction that a mistake was made. Trooper Corona's testimony included admissions to numerous mistakes he made while performing the field tests in this case. His candor supports the conclusion that he was testifying honestly about what occurred during his encounter with defendant. Overall, none of defendant's arguments are persuasive. Therefore, the district court did not err when it found that the traffic stop was justified in this case and the circuit court did not err in denying defendant's application for leave to appeal.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Deborah A. Servitto

/s/ Anica Letica